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UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEVADA

In Re:)	
)	Case No. 09-26137-BAM
WALTER A. WALTERS,)	
)	Chapter 11
Debtor.)	
_____)	Adversary Proceeding No.: 09-1285-BAM
)	
DANIEL and GLORIA LORTI,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
WALTER A. WALTERS,)	
)	
Defendant.)	
_____)	

MOTION TO DISMISS COMPLAINT

Walter A. Walters (the “**Defendant**”) by and through his attorneys, The Schwartz Law Firm, Inc., submits his Motion to Dismiss (the “**Motion**”) the Complaint (the “**Complaint**”).

This Motion is based upon Federal Rule of Civil Procedure 12(b)(6), incorporated herein by Bankruptcy Rule 7012, the exhibits attached hereto, and all papers and pleadings on file herein.

FACTUAL BACKGROUND

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2 1. On August 31, 2009 (the “**Petition Date**”), the Defendant filed his petition under
3 Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the
4 “**Bankruptcy Code**”).
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6 2. Mr. Walters was forced to file bankruptcy because of the drop in the value of his real
7 estate holdings stemming from the fall in the economy in general and the Las Vegas real estate
8 market in particular.
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10 3. Mr. Walters helped find investment properties for a number of investors, including
11 Daniel Lorti and Gloria Lorti (collectively, the “**Lortis**,” or the “**Plaintiffs**”), for the last twenty
12 years.
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14 4. The Lortis first became investors in the Defendant in 2003. The Lortis are
15 sophisticated hard money lenders, who routinely made loans to various individuals, generally secured
16 by real estate.
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18 5. For approximately 5 years, the Defendant made routine payments to the Lortis in
19 connection with their investments. Due to the economic downturn in the United States generally, and
20 the real estate markets in California and Nevada specifically, in late 2008, many of the properties
21 securing the Lortis investments fell into disrepair and foreclosure. The Lortis are aware of each
22 investment in which their loans were foreclosed as the equity in those properties was lost.
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24 6. The Lortis did not express displeasure with Mr. Walters’ investments until late 2008
25 when he was no longer able to continue his payments.
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27 7. At this point, the Lortis investigated Mr. Walters investment activities and alleged
28 those investments did not comport with the understanding between the parties.
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1 8. The conveyances the Lortis complain of in the Complaint were available through a
2 search of public records prior to 2008.

3 9. The Lortis have not provided any contracts to support their allegations.

4 10. In August 2009, however, a complaint was filed against the Defendant in Nevada state
5 court by the Lortis to appoint a receiver over certain of the Defendant's properties. A settlement
6 among the parties could not be reached. Accordingly, the Defendant elected to file this Chapter 11
7 case in order to provide one venue for all creditors to resolve their claims and receive equal treatment.
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9 11. On October 7, 2009, the Plaintiffs filed a Complaint initiating this adversary
10 proceeding.
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14 **Plaintiff's Complaint Should be Dismissed Because the Plaintiffs**
15 **Failed to State a Claim For Fraud Against the Defendant**

16 12. Federal Rule of Civil Procedure 12(b)(6), made applicable here by Bankruptcy Rule
17 7012, authorizes the Court to dismiss the Complaint for failure to state a claim upon which relief can
18 be granted. It is well established that "[d]ismissal is proper under Rule 12(b)(6) [where] it appears
19 beyond doubt that the non-movant can prove no set of facts to support its claims." Adams v.
20 Johnson, 355 F.3d 1179, 1183 (9th Cir. 2004). To survive a motion to dismiss, a complaint must be
21 pled showing plaintiff's entitlement to relief. Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1664-
22 66 (2007). This "requires more than labels and conclusions, and a formulaic recitation of a cause of
23 action's elements will not do." Id., citing, C. Wright & A. Miller, Federal Practice and Procedures §
24 1216, pp. 235-36 (3d ed. 2004). Factual allegations must be enough to raise a right to relief above the
25 speculative level. Id. When faced with a motion to dismiss, the court must accept the well-pleaded
26 factual allegations of the complaint as true, and reasonable inferences must be drawn in the plaintiff's
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1 favor. Tellabs, Inc. v. Makor Issues & Rights. Ltd., 127 S.Ct. 2499, 2509 (2007).

2 13. Only “fair” inferences arising from the pleading, however, must be accepted by the
3 court. Simpson v. Mars, Inc., 929 P.2d 966-967 (D. Nev. 1997). Bald contentions, unsupported
4 characterizations, and legal conclusions are not well-pleaded allegations, and will not suffice to defeat
5 a motion to dismiss. See G.K. Las Vegas Ltd. P’ship v. Simon Prop. Group. Inc., 460 F.Supp.2d
6 1246, 1261 (D. Nev. 2006); Sprewell v. Golden State Warriors, 266 F.3d 978, 988 (9th Cir. 2001).
7 The court is not required “to accept as true allegations that are merely conclusory,” “unwarranted
8 deductions of fact, or unreasonable inferences.” Sprewell, 266 F.3d at 988. “Courts will not assume
9 the truth of legal conclusions merely because they are cast in the form of factual allegations,” and will
10 not assume that plaintiffs “can prove facts which [they have] not alleged, or that the defendants have
11 violated laws in ways that have not been alleged.” Warren v. Fox Family Worldwide, Inc., 328
12 F.3d 1136, 1139 (9th Cir. 2003), accord, Western Mining Council v. Watt, 643 F.2d 618, 624 (9th
13 Cir. 1981).

14 14. A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory
15 or on the absence of sufficient facts alleged under a cognizable legal theory. Navarro v. Block, 250
16 F.3d 729, 732 (9th Cir. 2001); Balistreri v. Pacifica Police Dep’t., 901 F.2d 696, 699 (9th Cir. 1988).
17 When the defense of the statute of limitations appears on the face of the complaint, a motion to
18 dismiss for failure to state a claim is proper. Keller v. Snowden, 87 Nev. 488, 489 P.2d 90 (Nev.
19 1971).

20 **The Plaintiffs Did Not Properly Plead Fraud**

21 15. The Plaintiffs allege fraud in their Complaint but do not plead fraud with specificity as
22 required. Fed. R. Civ. P. 9(b), made applicable here by Fed. R. Bankr. P. 7009. In Wohlers v.
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1 Bartgis, 114 Nev. 1249, 969 P.2d 949 (1999), the Nevada Supreme Court set forth the elements of
2 fraud as follows:

3 (1) A false representation made by the defendant; (2) defendant's know-
4 ledge or belief that the representation is false (or insufficient basis for making the re-
5 presentation); (3) defendant's intention to induce the plaintiff to act or to refrain from
6 acting in reliance upon the misrepresentation; (4) plaintiff's justifiable reliance upon the
misrepresentation; and (5) damage to the plaintiff resulting from such reliance.

7 See also Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 825 P.2d 588, 592 (1992).

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9 16. Pursuant to Rule 9(b), allegations of fraud must be stated “with particularity.” This
10 heightened pleading standard serves the important purpose of “alerting defendants to the precise
11 misconduct with which they are charged and protecting defendants against spurious charges of
12 immoral and fraudulent behavior.” Brooks v. Blue Cross and Blue Shield of Florida, 116 F.3d 1364,
13 1370-71 (11th Cir. 1997). Thus, the complaint must set forth the fraudulent behavior alleged, the
14 time and place of the behavior, the person responsible for the behavior, the manner in which the
15 behavior misled the plaintiff and what the defendants obtained as a consequence of the fraud. Id. at
16 1371. In other words, Rule 9(b) requires plaintiffs to allege the “who, what, where and when” of the
17 alleged violation. Furthermore, the Nevada Supreme Court has stated that “with particularity” means
18 specifying “the time, the place, the identity of the parties involved, and the nature of the fraud...”
19 Brown v. Kellar, 97 Nev. 582, 583, 636 P.2d 874 (1981).
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25 17. Plaintiffs’ Complaint fails to specifically identify the time, the place, the identity of the
26 parties involved, and the nature of the fraud. Furthermore, Plaintiffs fail to state with particularity
27 which of Defendant’s statements were false and why they were false. Rather, the Complaint includes
28 bland and general statements alleging that Defendant made false representations to Plaintiffs.
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31 18. In addition, Plaintiffs’ allegations are open-ended and of the catch-all variety. The
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1 Plaintiffs do not demonstrate conduct by the Defendant that caused them to act or refrain from acting
2 in reliance upon the alleged misrepresentations. Rather, the Plaintiffs retroactively smear the
3 Defendant for their business losses, without any facts to support their contention that Defendant acted
4 beyond the scope of their agreement. Indeed, the Plaintiffs produce no agreements between the
5 parties whatsoever. Absent the agreements, the Plaintiffs can prove no set of facts supporting fraud.
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8 19. The Plaintiffs are vague where specificity is required, therefore, no facts appear in this
9 case to show fraud or dishonesty or impropriety. Accordingly, the claim of fraud against the
10 Defendant should be dismissed.
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12 **There Is No Fiduciary Relationship Between the Defendant and the Lortis**

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14 20. The Lortis attempt to lump a breach of fiduciary duty claim with their fraud claim.
15 See Complaint, p. 2. This is not possible as the Lortis never explain what the fiduciary relationship
16 between the parties consists of and what the Defendant's obligations to them were. In addition, the
17 Lortis breach of fiduciary duty claims are devoid of any factual content as they never state which
18 fiduciary obligations were breached, or how they were breached. Rather, the Lortis make bland and
19 general allegations concerning the conduct of the Defendant that somehow resulted in a breach of a
20 fiduciary obligation.
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24 21. The Parties were involved in transactions wherein the Defendant paid the Plaintiffs
25 periodically for the money they provided him for real estate investments. This was the arrangement
26 as demonstrated by the facts presented by the Lortis. Once the economy went into a tailspin, the
27 Defendant, similar to many involved in the real estate business, was no longer able to meet his debt
28 obligations because the value of his properties drastically decreased. This impacted his ability to
29 refinance and obtain new credit, but importantly, it also affected his rental income as the rental
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1 market began a simultaneous decline. The downward spiral in these markets was not the result of the
2 Defendant's fraud.

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4 22. Indeed, the simultaneous impact of all these factors made it impossible for the
5 Defendant to honor his existing debt obligations and forced him to file bankruptcy, an act the Court
6 itself found to be in good faith. Although unfortunate for all involved, an inability to pay one's debt
7 does not constitute breach of fiduciary duty or fraud. Accordingly, it is appropriate here to follow the
8 view discussed above and dismiss the claim for breach of fiduciary duty against the Defendant.
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11 **The Plaintiffs Fail to State a Claim for Elder Abuse**

12 23. NRS 41.1395 provides a private cause of action for individuals against injury or loss
13 suffered by older persons. Plaintiffs' elder abuse claim fails, however, as Plaintiffs have not alleged
14 facts sufficient to satisfy a claim under the statute. NRS 41.1395(1) requires that any action for loss
15 of money or property suffered by older persons be caused by "exploitation." NRS 41.1395(4)(b)
16 defines "exploitation" as any act taken by a person who has the trust and confidence of an older
17 person to (1) [o]btain control, through deception, intimidation or undue influence, over the money,
18 assets or property of the older person . . . or (2) convert money, assets or property of the older person
19 with the intention to permanently deprive the older person of the ownership, use, benefit or
20 possession of his assets, money or property. NRS 41.1395(4)(b). The Plaintiffs are sophisticated
21 investors who cannot now claim to have been exploited simply because their real estate investments
22 collapsed.
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24 24. Here, Plaintiffs failed to allege that Defendant obtained any property or money of the
25 Plaintiffs through deception, intimidation or undue influence. As set forth above and in the
26 Complaint, Plaintiffs and Defendant were involved in a series of transactions where Defendant paid
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1 the Plaintiffs periodically for the money they provided him. Plaintiffs were sophisticated hard money
2 lenders who routinely made loans to individuals, often secured by real estate. The Plaintiffs should
3 not be allowed to claim otherwise because it is convenient for the purposes of their Complaint.
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5 25. Furthermore, Plaintiffs failed to allege any facts whereby Defendant converted the
6 money or assets of Plaintiffs with the intent to permanently deprive them of such money or assets. As
7 set forth above, and as alleged by the Plaintiffs, the Parties were involved in a series of transactions
8 whereby the Defendant periodically paid the Plaintiffs for the money they invested in him.
9 Furthermore, the Defendant routinely made payments to Plaintiffs for approximately 5 years.
10 Plaintiffs have not stated any facts which even suggest that Defendant intended to permanently
11 deprive the Plaintiffs of their money or property. Absent proof of such intent, the Complaint fails as
12 a matter of law.
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16 26. Accordingly, Plaintiffs failed to allege that they suffered a loss of money or property
17 caused by "exploitation," as defined by NRS 41.1395(4)(b). Plaintiffs have not set forth any factual
18 allegations that (1) Defendant obtained Plaintiffs' money through deception, intimidation or undue
19 influence and (2) Defendant converted Plaintiffs' money with the intention of permanently depriving
20 them of it. Therefore, Plaintiffs' elder abuse claim fails to state a claim for which relief can be
21 granted and should be dismissed.
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CONCLUSION

WHEREFORE, the Defendant respectfully requests the Court: dismiss the Plaintiffs' causes of action for (i) fraud, (ii) breach of fiduciary duty, (iii) elder abuse, and (iv) such other relief the Court deems just and proper.

Dated this 12th day of November, 2009.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent on November 12, 2009, electronically via the Court's CM/ECF system to the following:

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I HEREBY CERTIFY that a true and correct copy of the foregoing was sent on November 13, 2009 VIA REGULAR Mail to the following:

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